STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Menard Electric Cooperative, Inc.	:	
-vs-	:	
Central Illinois Public Service Company	:	90-0217
	:	
Complaint under the Electric Supplier Act regarding service in Menard County, Illinois.	:	

ORDER

By the Commission:

I. PROCEDURAL HISTORY

In this proceeding, Menard Electric Cooperative, Inc. ("Menard" or "MEC") filed a complaint with the Illinois Commerce Commission ("Commission") against Central Illinois Public Service Company ("CIPS") seeking an order authorizing Menard to provide electric service to the residence located on a 1.52 acre tract of land owned by Donald Patrick Thompson ("Donald Thompson" or "Thompson Jr.") located near the Village of Fancy Prairie in eastern Menard County, Illinois. This tract is more particularly described on Menard Exhibit No. 19. The basis of Menard's complaint is that Menard is entitled to provide service to the tract under Section 5 of the Electric Supplier Act, 220 ILCS 30/1 et seq. ("Act" or "ESA"), or in the alternative under Section 8 of the Act.

CIPS filed a verified Answer, Affirmative Defense and Counterclaim, denying Menard's claims and asserting that CIPS possessed the exclusive right to furnish service to Donald Thompson pursuant to the provisions of Section 8 of the ESA.

Menard filed an Answer to the Counterclaim of CIPS denying the right of CIPS to serve the disputed territory pursuant to Section 8 of the Act. Menard has also filed an Answer to the Affirmative Defense of CIPS denying that Menard has relinquished any rights under Section 5 of the Act.

Pursuant to notice duly given, hearings were held before a duly authorized Hearing Examiner of the Commission at its offices in Springfield, Illinois. Appearances were entered by counsel on behalf of Menard and CIPS respectively, and by a member of the Commission's Engineering Department. There were no other appearances. Evidence was presented and at the conclusion of the hearing, the record was marked "Heard and Taken." Briefs and reply briefs were filed by Menard and CIPS, and a

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supplemental reply brief was filed by Menard. Exceptions to the Hearing Examiner's Proposed Order, including arguments and suggested replacement language, were filed by CIPS. A reply thereto was filed by Menard.

II. FACTS/BACKGROUND

As of July 2, 1965, Edward and Alice Winterbauer were the sole owners of a 32.76 acre farm near Fancy Prairie in Menard County, and were receiving electric service there from Menard. This property, known as the "Winterbauer Farm," is legally described in paragraph 4 of MEC's complaint. The configuration and dimensions of this 33 acre tract as of July 2, 1965 are shown in a map prepared by Menard and identified as Menard Exhibit 4. Menard states that it began serving this property, which at that time was held by a predecessor owner, in October of 1938, and that the property to which service was commenced by Menard consisted of a house and farm buildings. (Menard Brief at 3-4)

In July of 1972, one James P. Thompson ("James Thompson" or "Thompson Sr.") took possession of a portion of the Winterbauer farm pursuant to an installment contract dated May 1, 1972. (CIPS Brief at 2) James P. Thompson thereafter erected a residence and requested service from CIPS. On July 14, 1972, CIPS mailed to Menard a "Notice of Proposed Extension of Electric Facilities Pursuant to Section 7 of the Electric Supplier Act," dated July 13, 1972. A copy of this notice is marked as CIPS Exhibit A-4. Menard characterizes this notice as a "notice of service to the James P. Thompson residence." (Menard Brief at 6) CIPS states that "Menard thereafter took no action to contest CIPS' extension of service to the James P. Thompson residence." (CIPS Brief at 3) CIPS also states that James P. Thompson ultimately purchased the property outright and recorded a warranty deed from the Winterbauers on March 10, 1981.

Menard states that on May 10, 1990, it received a notice from CIPS that CIPS intended to provide service to a new house occupied or to be occupied by Donald P. Thompson, who is James P. Thompson's son. (Menard Ex. 11; Menard Brief at 4) CIPS states that this home is on the western portion of the land which James P. Thompson purchased from the Winterbauers, as noted above. Menard says the notice received on May 10, 1990 pertained to a 1.52 acre tract eventually conveyed by James Thompson and his wife to Donald P. Thompson.

III. SECTION 5

A. Introduction; Sections 5 and 7

Menard represents that after receiving the notice in May of 1990, it determined from its records that Menard had been serving the 33 acre Winterbauer tract as of July 2, 1965, and has continued to serve the Winterbauer farmstead thereafter. (Menard Brief at 6) Menard says it then determined that the 1.52 acre tract was part of the

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original 33 acre farm, and thus, Menard reasons, it was entitled to serve the Donald Thomoson residence. (Menard Brief at 5) Menard notified CIPS of this position, and the complaint was filed.

According to Menard, it has Section 5 rights to serve the Donald Thompson residence located on the 1.52 acre tract. (Menard Brief at 18) Section 5 reads in part as follows:

> § 5. Each electric supplier is entitled, except as otherwise provided in this Act or (in the case of public utilities) the Public Utilities Act, to (a) furnish service to customers at locations which it is serving on the effective date of this Act, (b) furnish service to customers or premises which it is not now serving but which it has agreed to serve under contracts in existence on the effective date of this Act, and (c) resume service to any premises to which it has discontinued service in the preceding 12 months and on which are still located the supplier's service facilities.
>
> Except as otherwise provided in this Act or (in the case of public utilities) the Public Utilities Act, no electric supplier may construct new lines, or extend existing lines, to furnish electric service to a customer or his premises which another electric supplier is entitled to serve, as provided in this Section, except with the written consent of such other electric supplier subject to the approval of the Commission as to such consent, if required.

Section 7 of the Act reads in part as follows:

> § 7. Except as otherwise provided in this Act, until the respective service areas of the affected electric suppliers have been determined as provided in Section 6, no electric supplier may make an extension of existing lines or construct new lines for the purpose of furnishing service to a customer or premises which it is not entitled to serve under Section 5, or furnish service to any customer or premises which such supplier is not entitled to serve under Section 5, unless in any such case such electric supplier gives written notice to the electric supplier or suppliers which may be adversely affected by the proposed construction, extension or service. Any electric supplier which claims that it should be permitted to serve any customer or premises which could be served by such proposed construction, extension or furnishing of service may within 20 days after receipt of such notice or, if no notice is received, not later than 18 months after the completion of such proposed construction, extension or the commencement of service, file its complaint with the Commission which shall proceed to determine the issue as provided in Section 8.

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B. Menard's Position

First, Menard contends the Commission must make an initial determination of service rights under Section 5. In Menard's view, if the Commission can make such a determination under Section 5, then that concludes the matter since the Commission may only make a determination under Section 8 if it concludes that Section 5 gives no basis for such a decision. Coles-Moultrie v. Illinois Commerce Commission, 76 Ill. App. 3d 165, 31 Ill. Dec. 750 (4th Dist. 1979), hereinafter "Coles-Moultrie v. Commission." (Menard Brief at 18)

Next, Menard argues that a determination on the dispute before the Commission in this case can be made on the basis of Section 5. Menard says Section 5 of the ESA clearly provides that if an electric supplier is furnishing electric service to the "location" on July 2, 1965, then the supplier is grandfathered to provide service to every other part of that "location" for which electric service is requested thereafter. Western Illinois Electric Coop. v. Ill. Commerce Commission 67 Ill. App. 3d 603; 385 NE 2d 149; 24 Ill. Dec. 382 (4th Dist. 1979) ("Western"). Menard states that the Western case has been followed by the Commission in every factual situation in which a supplier has been providing electric service to the farmstead on a farm when subsequent service demands have occurred at other points within the farm boundaries as defined on July 2, 1965. Menard says the record is clear that it was furnishing electric service to the Winterbauer farmstead located on the 33 acre tract involved in the instant case, and that CIPS has made no claim to serve on the basis of Section 5 of the ESA. Therefore, under the principles established by Western and the principles of Section 5 of the ESA Menard believes it is entitled to provide electric service to the residence located on the 1.52 acre tract of Donald Thompson. Consequently, Menard's entitlement to serve the Thompson Jr. residence under Section 5 is, in Menard's opinion, absolute and undisputed.

In Menard's view, since the Commission can make the determination of service rights in the case pursuant to Section 5 of the ESA, no further analysis is necessary. (Menard Brief at 18-19)

Menard also argues that it has not waived its Section 5 entitlement rights to serve the Donald Thompson residence. (Menard Brief at 19) Menard states that CIPS has filed an affirmative defense to the complaint of Menard alleging that Menard has waived its Section 5 entitlement rights to serve the Thompson Jr. residence located on the 1.52 acre tract. Menard says the basis for that claim is that CIPS mailed a notice under Section 7 of the ESA dated July 13, 1972. This notice is marked CIPS Exhibit 4. Menard states that the notice does not name a potential customer nor does it identify a particular location at which service is to be supplied by CIPS. It is now clear, Menard submits, that the notice of July 13, 1972 pertained only to electric service for the James Patrick Thompson residence located on a separate tract east of the "location" now in dispute. Nevertheless, Menard states, CIPS claims that this July 13, 1972 notice

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destroys Menard's Section 5 entitlement rights as to all of the 33 acre tract of the Winterbauers, with exception of the farmstead that is still served by Menard, because Menard did not contest such service.

Menard believes such an analysis of the Section 5 entitlement rights of Menard is superficial at best, in that it fails to take into account the "location" to which the July 13, 1972 notice can at best be gratuitously construed to apply. In Menard's view, the electric service provided by CIPS pursuant to such notice was limited solely to the residence of James Patrick Thompson and to no other "location."

Menard further argues that when 31 acres of the Winterbauer tract was sold to James Patrick Thompson, it was sold in two separate tracts and that these tracts were never, at any time, contiguous to each other. Menard claims that there is a tract 41 feet in width and over 560 feet in length that separates the tract upon which the James Patrick Thompson residence is located (and to which the July 13, 1972 Section 7 notice pertained) from the 1.52 acre tract of Donald Thompson Jr. over which this dispute has arisen. It is Menard's position that the July 13, 1972 notice did not constitute a waiver of any Section 5 rights by Menard for the reason that on that date, the term "location" as utilized in Section 5 of the Act had not been defined by the courts or by the Legislature and at that time was being construed in a restrictive sense by the Commission. As a result, Menard argues it had no knowledge of any claimed right under Section 5 to serve any other location on the 33 acre Winterbauer tract besides the farmstead. Menard says the availability of such right did not become known until 1979 when the Western and Coles-Moultrie v. Commission cases were decided.

As a result, Menard reasons, since a waiver can only exist as to a known right, the failure of Menard to dispute the Section 7 notice of July 13, 1972 as to the James Patrick Thompson residence cannot be construed as a waiver of the right of Menard to serve that residence in question on the basis of an expanded and broad definition of "location" under Section 5 of the Act. In addition, Menard contends that Section 5 requires an electric supplier to waive its rights under Section 5 by a written agreement and that there is no written waiver in this case. In addition, Menard claims that the Western decision, in a holding that is dicta, determined that an electric supplier does not waive its Section 5 rights by allowing an interloper electric supplier to serve another site on the farm without contesting the same.

C. CIPS' Position

CIPS' position is set forth in its pleadings, testimony, briefs and exceptions to the proposed order. In its brief, CIPS argues that Menard forever waived its right to assert a Section 5 claim by failing to contest CIPS' 1972 service to James P. Thompson. (CIPS Brief at 4-6) CIPS says Section 5 of the Electric Supplier Act creates a statutory cause of action which, if pleaded and proven in the forum provided by the Commission pursuant to Section 7 of the Act, can result in an order declaring and awarding an exclusive right to serve to one of two competing electric suppliers.

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CIPS says there is no dispute that both the James P. Thompson and Donald Thompson residences lie within the 1965 boundaries of the Winterbauer Farm, nor that CIPS extended its lines and connected service to the James P. Thompson residence in 1972 when the Winterbauers were still the record owners of the entire unitary tract. CIPS also says there is likewise no dispute that Menard failed to invoke the Commission's' jurisdiction under the ESA to contest CIPS' service to James P. Thompson, either within 20 days of the July 14, 1972, notice or within 18 months from the date CIPS began furnishing service, all as provided by Section 7 of the ESA.

CIPS states that this Commission has held:

> . . . that Section 7 of the ESA enables an electric supplier holding a Section 5 electric service entitlement to contest another electric supplier's extension of lines into the Section 5 location provided that the aggrieved electric supplier files its complaint with the Commission within 18 months after the . . . commencement of service. (emphasis added).

Coles-Moultrie Electric Cooperative v. Central Illinois Public Service Company, No. ESA 248 (June 15, 1989), hereinafter "Coles Moultrie v. CIPS," CIPS claims the Commission made abundantly clear, in rejecting the same argument that Menard advances here, that the 18-month limitation period in Section 7 begins to run with the first connection by a competing supplier on the Section 5 location and bars further claims of service based on Section 5 to all later customers at the same location.

CIPS cites another Commission decision for the proposition that a Section 7 notice that contains ". . . a map of . . . [the] . . . area should be sufficient to put a party who may be adversely affected on notice of the area that is contemplated to be served by the author of the notice." Commonwealth Edison v. Jo-Carroll Electric Cooperative, Inc., Docket No. 88-0075 (August 23, 1989) ("Edison v. Jo-Carroll") CIPS adds, "Any Section 5 rights that the supplier . . . may have had were extinguished after it failed to challenge the 1972 notice as provided for in Section 7." (CIPS Brief at 4-6)

In its reply brief, CIPS says Menard's Section 5 argument ignores the fact that Section 7 of the Electric Supplier Act, enacted July 2, 1965, expressly provides, in a clearly mandatory fashion, two deadlines for contesting a competing supplier's extension of lines: 20 days in the case of extensions by notice, and 18 months in the case of extensions without notice. CIPS claims Menard's ignorance of the law coupled with its receipt of a Section 7 notice substantially similar to one deemed adequate by the Commission in Edison v. Jo-Carroll (Docket No. 88-0075), undercuts its attempt to portray itself as the rightful beneficiary of the waiver cases cited.

In CIPS' view, the record allows no other conclusion than that (1) Menard knowingly and voluntarily chose not to investigate whether it possessed a Section 5 right to serve James Patrick Thompson in 1972, and (2) elected not to initiate a

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proceeding in this Commission to enforce such a right. CIPS says complaining about the contents of the notice is likewise unavailing because the statute does not require notice and by operation of law bars any claim under Section 5 not asserted within 18 months of the competing supplier's extension of service. (CIPS Reply Brief at 2)

CIPS further argues that it has pleaded a "bar" under Section 7, not a "waiver" by Menard. (CIPS Reply Brief at 3-4) According to CIPS, to the extent any of Respondent's briefs or other legal arguments in this case have spoken in terms of a "waiver" by Menard, the reference has always been to Menard's failure to contest CIPS' 1972 line extension; and nowhere has CIPS cited any authority contending that Menard's inaction amounts to a legal "waiver." CIPS says the Commission's own decisions, cited by CIPS, e.g., Coles-Moultrie v. CIPS and Edison v. Jo-Carroll, *supra*, state that Section 5 rights are "extinguished" or "barred" by a "failure to challenge" a Section 7 notice.

CIPS next argues that Menard cannot now complain of the "retroactive" application of later decisions because any retroactive impact arises solely from Menard's voluntary failure to protect its rights in 1972. (CIPS Reply Brief at 4-5) In CIPS' view, the fact is that Menard could have avoided the operation of the Section 7 limitation by contesting the notice it received from CIPS, and having elected to ignore the notice, Menard cannot now complain of any due process violation by the application of the Section 7 limitation to the claim in this case.

CIPS also contends that the record establishes that CIPS extended service to James Patrick Thompson at a point in time when the Winterbauers owned the entire location. According to CIPS, while it is true that in 1981 the James Patrick Thompson residence became "separated" from the area retained by the Winterbauers in the 1981 warranty deed, and that the land conveyed to Donald Patrick Thompson in 1990 is therefore not now contiguous to the area on which James Patrick Thompson erected his home in 1972, these events subsequent to 1972 have no relevance to any issue in this case. CIPS says Menard does not dispute the fact that the Winterbauers owned in fee the entire site on which James Patrick Thompson erected his home in 1972 and that CIPS therefore furnished service on Menard's claimed Section 5 location in July, 1972. CIPS argues that the Appellate Court for the Fourth District has unequivocally held that the creation of a tenancy by the owner of land does not divide a Section 5 location so as to allow a competing supplier to claim that the tenants occupy new or different "locations." Coles-Moultrie v. Commission (CIPS Reply Brief at 5-6)

D. Menard's Reply

In its reply brief, Menard claims the authorities cited by CIPS to support the argument that Menard has waived its Section 5 rights to serve the Donald Thompson Jr. residence are not supportive of the position taken by CIPS. (Menard Reply Brief at 16) Menard says the Coles-Moultrie v. CIPS decision in ESA 248 was decided June

14, 1989, long after the 1972 notice in the instant case relied upon by CIPS as the basis for the waiver arguments.

With regard to the Edison v. Jo-Carroll decision in Docket No. 88-0075, Menard says that case specifically involved a notice which gave the boundaries of the territory to which the notice applied and for which Commonwealth Edison sought authority for electric service. The Commission specifically found at page 4 of its order in 88-0075:

> The notice, which was submitted in evidence, included a map delineating the boundaries of the Lake Carroll Development.

Menard says the order also found at page 6 that when the notice contained a reference to the entire Lake Carroll Development, and a map of that area was attached to the notice, then the party receiving the notice had sufficient information as to the area adversely effected.

Accordingly, Menard argues, CIPS could easily have included the boundary lines of the James Patrick Thompson tracts of ground in the 1972 Section 7 notice if CIPS had intended in the first instance for the 1972 Section 7 notice to apply to more than just the residence of James P. Thompson.

In Menard's view, if CIPS was in fact asserting rights to all of the James P. Thompson property, then it was incumbent upon CIPS to place those boundaries in the form of a map on its Section 7 notice to Menard in 1972. Menard believes the failure of CIPS to do that prevents CIPS from now claiming that Menard has waived its Section 5 rights as to the balance of the James P. Thompson tract.

In its reply brief, Menard also takes issue with suggestions by CIPS that James P. Thompson's possession of the property under the contract for deed dated May 1, 1972 is not a "purchase." Under the doctrine of equitable conversion as between the vendor and the purchaser, Menard argues that the purchaser is regarded as the owner of the land subject to a lien in favor of the vendor for the purchase price. Kindred v. Boalbey 73 Ill.App. 3d 37; 391 N.E.2d 236; 29 Ill.Dec. 77, 79-80 (3rd Dist. 1979). Menard contends that any installment contract for the sale of real estate places both possession and ownership rights in the name of the buyer subject only to completing the terms of the installment contract. Menard says the parties intended for Donald Thompson as the buyer to have ownership rights subject only to payment of the contract in full, and that the Winterbauers retained only a security interest by retaining title until completion of the contract in full.

In its supplemental reply brief, Menard responds to arguments in CIPS' reply brief where CIPS contends that because the limitations of Section 7 operate to bar untimely claims of entitlement, Menard's "waiver" analysis has no merit, and that CIPS has pleaded the bar of Section 7, not a "waiver" by Menard. Menard argues that Section 7 does not act as a bar to Menard's Section 5 claim to serve the Donald

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Thompson residence on the 1.52 acres. According to Menard, the history of the interpretation of Section 5 precludes application of the time limitations in Section 7 to bar the service in question based on a 1972 Section 7 notice by CIPS for a separate location within the Winterbauer farm. Menard further argues that Section 7 bars only a claim to serve a customer or a premise to which the Section 7 notice applies. Menard also argues that a statute of repose is not intended to retroactively bar unknown rights.

In its supplemental reply brief, Menard also argues that the time limitations in Section 7 are not applicable to Section 5 rights, but only to rights claimed under Section 8 of the Act. The Commission notes that this particular argument was not raised in a timely manner by Menard, and thus warrants no further consideration in this docket.

E. Exceptions

In its exceptions, CIPS claims, among other things, that Section 7 creates no penalty for failure to serve an extension notice. (CIPS exceptions at 10) With regard to the July 13, 1972 notice sent by CIPS, it is argued by CIPS that this notice sufficiently notified Menard of facts that triggered Menard's duty under Section 7 to assert any claims (whether under Section 5 or otherwise) of service entitlement to that customer and that Menard's failure to do so fully extinguished any Section 5 claim it may have had at that time. According to CIPS, this conclusion accords with the Appellate Court's decision in Coles-Moultrie v. Illinois Commerce Commission, 76 Ill.App. 3d 165, (4th Dist. 1979) that rejected a "point of delivery" division of Section 5 locations, and with the Commission decision in Coles-Moultrie - ESA 248, that the failure to contest the first adverse connection on a Section 5 location bars the Section 5 claim in its entirety. (CIPS exceptions at 11-12)

F. Commission's Conclusion

The parties' positions on the Section 5 issue are described above, and will not be repeated in detail here. Menard says that under Section 5 of the Act, if a supplier is furnishing service to the "location" on July 2, 1965, then the supplier is grandfathered to provide service to every other part of that location for which service is requested thereafter. In the case of farm boundaries in existence on July 2, 1965, Menard states that under the Western case, when a supplier was providing service on July 2, 1965 to a farmstead within those farm boundaries, then those farm boundaries are deemed to frame the "location" within the meaning of Section 5. Menard says that on July 2, 1965 it was furnishing service to the Winterbauer farmstead on the 33 acre Winterbauer farm, and thus, it would be entitled to provide service to every other part of that location for which service would be requested. For the most part, these assertions are not at issue, although CIPS claims any Section 5 entitlements enjoyed by Menard were extinguished by Menard's failure to assert them, under Section 7, in 1972.

As noted above, on July 14, 1972, CIPS sent Menard a "notice of proposed extension of electric facilities pursuant to section 7" of the Act. A copy of this notice

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was marked as CIPS Exhibit A-4. Menard characterizes this as a "notice of service to the James P. Thompson residence" which was then being or had recently been constructed. As explained more fully above, much of the dispute on the Section 5 issue involves the effect of this Section 7 notice on Menard's Section 5 rights.

Under Section 7, no supplier may make an extension of lines for the purpose of furnishing service to a customer or premises which it is not entitled to serve under Section 5, unless it gives written notice to the supplier which may be adversely affected. Upon receipt of such notice, the adversely affected supplier with the Section 5 rights has 20 days to file a complaint. Absent such a notice, the adversely affected supplier has 18 months to file a complaint.

With regard to the July 13, 1972 notice which was prepared and sent by CIPS, the Commission agrees with Menard that this notice should be interpreted as being limited to the James Thompson residence; that the notice contained no indication of any intent to provide service to areas other the James Thompson residence; and that Menard was entitled to rely on the limited scope of the notice in determining its future actions. Accordingly, when Menard did not file a complaint within 20 days after the notice in July of 1972, Menard relinquished its Section 5 rights with respect to the James Thompson residence only, which was the subject of the notice, and did not relinquish any Section 5 rights with respect to the rest of the acreage conveyed to James Thompson or to any other portions of the original 33 acre tract.

As noted above, CIPS has also made arguments that rely on the 18 month period described in Section 7 of the Act. However, even assuming CIPS could properly raise an "18 month" argument under Section 7 if it had in fact extended its facilities beyond the scope of its 1972 notice (which was limited to the James Thompson residence), this issue is not before the Commission because there is no indication that CIPS extended its facilities beyond the James Thompson residence prior to 1990.

Therefore, upon receiving notice on May 10, 1990 of CIPS' intent to serve a new house being built by David Thompson on a 1.52 acre portion of the property previously conveyed to James Thompson, Menard was entitled to assert its Section 5 rights in a timely filed complaint which is the subject of this proceeding.

With regard to the Edison v. Jo-Carroll decision (88-0075) cited by the parties, the Commission believes that decision is on point and supports the conclusions reached herein. That case involved the issue of whether Edison's Section 7 notice to Jo-Carroll, and Jo-Carroll's failure to contest it, extinguished Jo-Carroll's Section 5 rights to the Lake Carroll Development. The focus was on the notice sent by Edison. The Commission ruled in favor of Edison, noting on page 4 that Edison's notice to Jo-Carroll stated that Edison "intended to serve the Lake Carroll Development" and "included a map delineating the boundaries of the Lake Carroll Development." The Commission found on page 6 that "a reference to the entire Lake Carroll Development and a map of that area should be sufficient to put a party who may be adversely

affected on notice," and that the letter sent by Edison "was clearly proper notice of its intent to serve the entire Lake Carroll Development as contemplated by Section . . . ."

In the instant case, the notice contained no reference to areas beyond the James Thompson residence, and indicated no intent to serve any such areas. Thus, the findings in the instant case that Menard was entitled to rely on that notice as being limited to the James Thompson residence, and that its Section 5 rights for areas beyond the James Thompson residence were not extinguished, appears consistent with the rationale used in the Edison v. Jo-Carroll decision. That being the case, Menard is entitled to assert Section 5 rights with regard to the property at issue in the instant proceeding, which is within the original 33 acre tract, and the Commission finds that Menard is entitled to serve that property pursuant to Section 5 of the Act.

In view of the determinations made above that Menard is entitled to serve the property in question under Section 5, such determinations are dispositive of this case. Accordingly, service rights in this case may not be decided on the basis of Section 8. However, since the parties have addressed Section 8 issues in this docket, the Commission will discuss such issues below, although they have no bearing on the ultimate decision.

IV. SECTION 8

A. Background

Section 8 of the ESA provides in part that in a Section 8 proceeding, the Commission shall give "substantial weight" to the consideration as to which supplier had existing lines in "proximity" to the premises proposed to be served. Also, the Commission "may consider, but with lesser weight;" customer preference, which supplier was first furnishing service in the area; the extent to which each supplier assisted in creating demand for the proposed service; and which supplier can furnish the proposed service with the smaller amount of additional investment.

Section 3.6 defines an "existing line" as one in existence as of the effective date of the Act, which is July 2, 1965. Section 3.13 of the ESA defines "proximity" as "that distance which is shortest between a proposed normal service connection point and a point on an electric suppliers line, which is determined in accordance with accepted engineering practices by the shortest direct route between such points which is practicable to provide the service." Section 3.10 defines "normal service connection point" as "that point on a customer's premises where an electric connection to service such premises would be made in accordance with accepted engineering practices."

B. Menard's Position

Menard states that the direct straight line distance from the CIPS 1965 line to the meter location of CIPS on the southwest corner of the Thompson Jr. Residence is 124

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feet. Menard also states that the direct straight line distance from the 1965 Menard line westerly to the proposed Menard meter location on the back side of the Thompson Jr. Residence is 116 feet 6 inches. Menard asserts that the distance from the Menard 1965 line to the northeast corner of the Thompson Jr. residence by a direct straight line is 64 feet. (Menard Brief at 7)

Menard asserts that the normal and customary location for residential meters by Menard is at a location as close as possible to the load center of the residence. Menard claims that it was the accepted engineering practice to locate the meter as near the load center as possible. Menard claims that accepted engineering practices required that the fuse box or load center be located near the area where the disconnect would be located between the meter and fuse box. Menard claims that based upon accepted engineering practice that the customary and accepted location for the fuse box and meter location for the Thompson Jr. residence would be on the north side of the house just east of the rear garage door. Menard states this would place the direct line distance from Menard's 1965 line to the meter location on the Thompson Jr. house at 116 feet 6 inches. (Id. at 7-8)

Menard asserts that the meter location of CIPS is not made in accordance with accepted engineering practices because it is located at the point that is furthest from the greatest number of heavy electrical using appliances within the residence. Menard claims that the CIPS location requires additional heavy wiring to be run by the customer from the location of the meter to the area where the large electrical appliances are located. (Id. at 8-9)

Menard states that the additional cost or investment to Menard to provide underground service by way of the route from Menard's 1965 line to the rear of the Thompson Jr. residence at the point proposed for the meter is $2066.59 less than the customer's contribution of $192.59 resulting in a net additional investment to Menard for the underground service of $1,874. Menard states that the additional investment for providing electric service to the customer by CIPS was $1957. Menard further states that the customer would have internal wiring costs based upon the meter location of Menard of $376.24 and that the customer had internal wiring costs based upon the meter location of CIPS of $845.12. (Id. at 9)

Menard asserts that CIPS had to provide the meter location at the point which it did because any other point would be much further from its 1965 line increasing the proximity distance and thereby defeating any potential claim it had to provide electric service to the residence as compared to a claim by Menard. Menard claims CIPS had to place the meter at the Southwest corner of the garage in order to have any basis for a proximity argument. Menard claims that the attempt by CIPS to service this customer caused the customer additional expense to the detriment of the customer. (Id. at 29-30)

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Menard states that Section 8 of the ESA provides for additional criteria of lesser weight which may be considered by the Commission if it so chooses. Menard states that the first is which electric supplier can provide the service with the least amount of additional investment. Menard states that it can provide service by underground to the residence with a meter location as proposed by Menard at the rear of the house next to the residence load center at a cost of $1,874 compared to the cost to CIPS of $1,957. (Id. at 31-32)

Menard states that the next criteria the Commission may consider is which supplier the customer prefers. Menard asserts that there is no evidence in this case as to which supplier is preferred by the customer in question. (Id. at 32) Menard states that the next criteria that the Commission may consider is which supplier was first furnishing service in the area. Menard asserts that CIPS did not serve in this area until 1972. Menard further asserts that it commenced providing service at this general area and "location" in 1938. (Id. at 32-33)

Menard states that the final criteria involves the extent to which each supplier assisted in creating demand for the proposed service. Menard asserts that the evidence at best is inconclusive on this point. (Id. at 32)

Menard concluded that it has the closest 1965 lines in proximity to any particular point on the residence in question and also to the point which would be the "normal service connection point" for providing electric service to the residence. Menard asserts that it can provide the service with the least amount of additional investment. Menard asserts that it was first to furnish service in the area and that there is no preference by the customer for a supplier or that there has been inadequate proof that the customer prefers one supplier over the other. (Id. at 33-34)

C. CIPS' Position

CIPS' position is set forth in its pleadings, testimony, briefs and exceptions to the proposed order. CIPS says the distance from the actual CIPS meter point location selected by Donald Thompson to the nearest point on CIPS' 1965 line is 124 feet, compared to a distance from the CIPS meter to Menard's 1965 line of 134 feet. CIPS claims this meter location is a normal service connection point within the meaning of Section 3.13.

CIPS states that the ESA is silent as to the meaning of the phrase "accepted engineering practices" and the Commission has not spoken directly to the subject in any ESA decision. CIPS states that the Commission has indicated, however, that it will examine a customer's rationale for selecting a given meter point to determine if the point is "reasonable." CIPS claims that Mr. Thompson desired the meter and service entrance on the forward portion of the outer wall of his garage to accommodate a "Service Box for Generator Hook-Up," and that he has placed a "200 AMP main breaker" just inside the entrance to accommodate this arrangement. CIPS argues that

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it is patently obvious that this rural customer desires the ability to place a gasoline-powered electrical generator on his driveway close to his main electrical service entrance in case of power outages. CIPS states that his personal desire for this configuration is *prima facie* reasonable and this Commission should not veto his choice without evidence from Menard far stronger than its nebulous "load center" theory. Citing Interstate Power Company v. Jo-Carroll Electric Cooperative, Inc., Docket Nos. 92-0450/93-0030 (Consolidated) (July 21, 1993) and Union Electric Company v. Western Illinois Electric Cooperative, ESA Nos. 20, 21 and 27 (Consolidated) (April 24, 1968), CIPS also argues that the Commission has previously stated that proximity is "dependent upon the practicability of the selected route being in harmony with the land use requirements of the customer." (CIPS Brief at 6-8)

CIPS asserts that Menard has advanced inconsistent theories of proximity in its pleadings, exhibits and testimony regarding its proposed normal service connection point at the Thompson residence. CIPS claims that Menard's proposal is vague and nebulous as to what criteria an objective third-party, such as this Commission, should apply to determine the location of the so-called load center. CIPS asserts that the statutory definition of "proximity" requires measurement of the distance between two points, not between a point an "area" as suggested by Menard. (Id. at 9-10) CIPS asserts Menard's witnesses do not agree on the meaning of the term "load center" and that Menard witness Smith contradicts his own definition of the term. (Id. at 11)

CIPS states that Menard fails to cite a single engineering textbook or treatise to support its contention that the meter location used by CIPS contravenes "accepted engineering practices" and is thus unreasonable because a meter must be located "near" the "load center" of the residence. CIPS states that Menard does not claim that any building code or electrical code prohibits or in any way brings into question the propriety of the meter point used by CIPS. CIPS states that Menard has not adduced any testimony or exhibits to prove that Menard utilized the "load center" theory in siting its own customers' meter locations. CIPS asserts that the record contains ample photographic evidence showing that Menard did not apply the "load center" theory at numerous homes it serves in the Lake Petersburg area. (Id. at 11-12)

CIPS disputes Menard's claim that the type of meter location installed by CIPS is in fact unusual for a residence. CIPS claims that in a number of instances Menard has accepted a meter location similar to or even identical with Donald Thompson's. CIPS asserts that Menard's own published criteria concerning meter locations fail to support the testimony of Menard's own witnesses on this issue. (Id. at 12-13)

In response to Menard, CIPS states that Menard did not adduce any evidence to contradict CIPS' verified allegation of customer preference or to rebut the testimony of CIPS' Gordon A. Tingley that Donald Thompson did not withdraw his application for service even after CIPS representatives made him aware that Menard might claim a right to serve him. CIPS asserts that this unrebutted evidence constitutes an adequate showing that the customer prefers CIPS' service. (CIPS Reply Brief at 7-8) CIPS also

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says it adduced evidence that it began providing service to the nearby Fancy Prairie area in 1929, some nine years before Menard's first service in 1938, and that its service to Donald Thompson's father contributed to Donald Thompson's request for service. (CIPS exceptions at 16) CIPS further claims that Menard witness Smith's testimony constitutes a selective recitation of Menard's customs and practices, but contains no evidence to establish that Menard's customs and practices constitute "accepted engineering practices" within the meaning of Section 3.10 of the ESA. (Id. at 8)

D. Menard's Response

Menard states that the customer, Donald Thompson, did not testify in this proceeding; therefore, there is no direct evidence of the preference for a supplier by the customer. Menard also states that there is no direct testimony about the reasons for the location of the meter. Menard states that testimony by CIPS witness Tingley about the meter point on the residence is simply his conclusion based upon where the meter was located by CIPS on the residence and that he did not talk to Donald Thompson. (Menard Reply Brief at 1-2) Menard states that CIPS could have easily called the customer, Donald Thompson, to testify in this proceeding if it had wished to have direct testimony bearing on the decision about the placement of the metering point and the preference of the customer for a supplier.

In response to CIPS' claim that Donald Thompson provided a hand drawn outline of the residence and that ". . .Mr. Thompson desired the meter and service entrance on the forward portion of the outer wall of his garage to accommodate a service box for generator Hook-Up . . . ." Menard asserts this is pure speculation on the part of CIPS. Menard states that there is nothing on the exhibit or in testimony to indicate that this location is the preference of Mr. Thompson.

Menard asserts that based on the testimony, one can just as easily speculate that the reason for the placement of the metering point at the corner of the garage of Donald Thompson at a point closest to the CIPS line was strictly for the benefit of CIPS. Menard suggests the meter location benefits only CIPS from the criteria of cost and proximity and no one else, and that little credibility should be given to the statements by CIPS witness Gordon A. Tingley that the customer selected the meter point. (Id. at 4-5)

Menard notes that the case of Interstate Power Company v. Jo-Carroll Electric Cooperative, Inc., Illinois Commerce Commission 92-0450 and 93-0030 consol., which was cited by CIPS, was remanded by the Circuit Court of Jo-Daviess County, Illinois. The Commission notes that following the proceedings on remand, the Commission entered an Order on remand on October 9, 1996, which was affirmed by the Circuit Court on February 5, 1998. In this case, which involved service to a facility of American/Freezer Services, Inc., the evidence, particularly the fact that the customer's required electric facilities were located on the north side of the facility, lead the Commission to conclude that the normal service connection based on accepted engineering practices would be at the transformer pads on the north side of the facility.

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The Commission noted that an engineering witness provided the engineering bases why the transformer pads were located there.

Menard states that the case of Union Electric Company v. Western Illinois Electric Cooperative, ESA Nos. 20, 21, and 27 consolidated cited by CIPS was reversed on January 21, 1970 by the Commission upon rehearing. Menard asserts that the result of that final Order is that a customer cannot unilaterally control the "normal service connection point" for the providing of the service to the property of the customer. (Id. at 6) Menard argues that the legal basis for determining proximity in accordance with 220 ILCS 30/3.13 must be the distance from the supplier's line to the metering location which must be determined and located in accordance with "accepted engineering practices." Menard indicates that the statue does not say that it has to be determined in accordance with the customer preference, nor does it say that the customer can unilaterally determine the metering point. Menard claims that if that were the case, the customer would, in every Section 8 case, control who the electric supplier would be and this is contrary to the purposes of the Act. Menard claims such an interpretation would remove State oversight and control over electric supplier territory when customers are to be assigned on the basis of proximity. Menard concludes that none of the precedent cited by CIPS on this point are relevant or authoritative help to the Commission in the instant case. (Id. at 7)

Menard asserts that there is no contradictory testimony that refutes the position of Menard that "accepted engineering practices" require the location of the metering point at or near the fuse box/circuit breaker and the heavy using energy devices within the residence. Menard states that CIPS depiction of certain residences at Lake Petersburg served by Menard as having their meters located on the garage is misleading. Menard claims that this testimony implies that those residences have their metering point located on the garage and that Menard traditionally services a residence by placing its meter on the side of the resident's garage. Menard says the surrebuttal testimony of Alan D. Horn shows that 61% of these residences have the fuse box/circuit breaker/load center located immediately behind the meter or very close nearby even though the meter is located on the garage wall. Menard claims that physical and terrain features often dictate the location of the meter rather than the location of the "load center" of the Lake Petersburg residences. (Id. at 9)

Menard states that the evidence in this case shows that it determines the metering location for residences to be the point which will be closest to the large energy using devises within the home and the point at which the circuit breaker/fuse box will be located. Menard asserts this will result in the least cost generally to the homeowner. Menard further asserts that locating the metering point near the heavy energy using devices will result in greater safety, which is the primary factor.

Menard states that its failure to cite an engineering textbook or treatise on the "accepted engineering practice" for determining the "normal service connection point"

for a residence is unfounded. Menard states that the opinion testimony of Dorland Smith, an engineer is certainly supportive.

Menard states that the written policy of Menard on meter location is found in the WIRING SPECIFICATIONS AND RECOMMENDATIONS 1987 page 15 number 203 and the MEMBER HANDBOOK page 13 item A number 4. Menard says both of these documents clearly state that Menard reserves the right to determine the meter location. Menard asserts that its historical practice of locating the residential meter at the load center of the residence, unless other physical requirements dictate otherwise, is supported by the written policy of Menard. Menard asserts that the opinion of Dorland W. Smith as an engineer that the meter is located near the residential load center is substantial evidence as to what the "accepted engineering practice" is for locating the "normal service connection point" of a residence. Menard claims that the testimony of CIPS witness Tingley supports this position. (Id. at 15-16)

E. Exceptions

In its exceptions, CIPS argues, among other things, that Menard has not adduced sufficient evidence to establish proximity under Section 8. (CIPS exceptions at 19-20) According to CIPS, Menard has not tendered any independent or objective engineering testimony in support of its "load center" theory and the conclusory opinions of Menard's own employees on the subject are not sufficient to comply with the "objective" and "independent" standards described in the Commission's Illinois Power and Interstate Power decisions. Moreover, CIPS argues, the photographic evidence showing numerous instances in which Menard itself connected service to meters placed on exterior garage wall shows that "accepted engineering practices" do not require rejection of CIPS' connection to an identical point on the residence involved here.

F. Commission's Conclusion

The Act provides that when determining which supplier is entitled to furnish the proposed service under Section 8, "proximity" shall be given "substantial weight." Section 3.10 of the Act mandates that proximity be determined by distance from the "existing" (1965) line to the "normal service connection point" which is determined in accordance with "accepted engineering practice."

The parties' positions regarding proximity are described above, and will not be repeated in detail here. Menard asserts that it is closest in proximity to the residence whether proximity is determined on the basis of the 1965 line to the closest point on the residence or on the basis of the distance from the 1965 line to the "normal service connection point" which is determined in accordance with "accepted engineering practice." CIPS' contention, which Menard disputes, is that the CIPS meter location at the Donald Thompson residence, to which CIPS' line connects, is the "normal service connection point" determined in accordance with "accepted engineering practice."

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CIPS says the evidence demonstrates that the distance from the CIPS 1965 line to the meter location of CIPS on the southwest corner of the Thompson Jr. residence, which CIPS describes as the actual metering point selected by the customer, is 124 feet, while the distance from Menard's 1965 line to the CIPS meter location is 134 feet. However, the distance from Menard's 1965 line to its proposed meter location is 116 feet 6 inches.

The record indicates that the metering location is determined by Menard on the basis of safety considerations, initial cost, operating and maintenance costs, aesthetics and customer preference in that order. The evidence also demonstrates that, as a general matter, Menard has historically located its meters near the heavy energy using devises, referred to as the load center, to produce greater safety and lower initial cost. The fact that Menard has, in some instances, installed meters at other locations does not diminish this fact.

While CIPS observes that Menard does not claim that any building code or electrical code prohibits or in any way brings into question the propriety of the meter point used by CIPS, there is no evidence that any building code or electrical code prohibits or in any way brings into question the propriety of the meter point proposed by Menard. In addition, expert testimony of Menard's engineer Smith supports Menard's assertion that it properly applies relevant criteria in locating meters and that its proposed metering point, in the instance case, is in accordance with "accepted engineering practice."

The Commission finds that Menard's proposed metering location is determined in accordance with "accepted engineering practice" and thus, constitutes a "normal service connection point" under the Act. The distance from Menard's 1965 line to its proposed meter location on the Thompson Jr. house, 116 feet 6 inches, is less than the distance from CIPS' 1965 line to its meter location, 124 feet, even assuming the CIPS meter is at a normal service connection point. Thus, the Commission finds that Menard's existing lines were in proximity within the meaning of Section 8.

With regard to the "lesser weight" criteria in Section 8, which the Commission "may" consider, the Commission finds that the evidence is largely inconclusive, although it appears the customer preference criterion would favor CIPS, while the "first [to] furnish in service in the area" factor would favor Menard.

In conclusion, if this case were to be decided under Section 8 (which it is not), it appears that upon giving substantial weight to the proximity determination as discussed above, Menard would be the supplier entitled to furnish the service in question.

V. OTHER ISSUES

Menard also contends that its service entitlement rights under Section 5 have been used as security for loans with the Rural Electric Administration ("REA") and the

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National Rural Utilities Cooperative Finance Corporation ("CFC"). As such, Menard argues, those federal loans cannot be jeopardized by retroactive application of the July 13, 1965 notice from CIPS in a manner that defeats Menard's Section 5 rights to serve on the Winterbauer 33 acre tract. Menard also claims that to interpret the July 13, 1972 notice in such a broad retroactive fashion would jeopardize its stated federal purposes established by the Rural Electrification Administration, 7 USCA 901 et seq., unless the federal government consents to such a determination.

In response, CIPS argues that Menard's claimed constitutional and federal statutory limitations on this Commission's jurisdiction do not exist. CIPS says a claim of entitlement to provide electric service to an area or customer is not a "property" right within the meaning of the due process clause, and thus there can be no "taking" for constitutional purposes if this Commission rejects MEC's Section 5 claim in this case. Central Illinois Light Co. v. City of Springfield, 161 Ill.App.3d 364, 514 N.E.2d 602, 112 Ill.Dec. 939 (4th Dist. 1987). Likewise, CIPS argues, no provision of the Rural Electrification Act can be construed so as to limit the Commission's jurisdiction and authority under the ESA to resolve the dispute that MEC itself has brought before the Commission. CIPS says Section 907 of the Rural Electrification Act (7 U.S.C. 907) merely requires "borrowers" to obtain R.E.A. approval before the borrower "sell[s] or disposes[s] its property, rights, or franchises . . . "

CIPS further argues that Menard's "federal purpose" arguments do not limit the Commission's authority to apply the Electric Supplier Act in this case, and that Menard's claim that its "federal purpose" somehow impacts the Commission's decision in this case is vague and unpersuasive. (CIPS Brief at 13-14)

CIPS also claims Menard's arguments that it has somehow pledged its putative Section 5 "service territory" rights to the R.E.A./C.F.C., and that this "pledge" limits Commission authority must likewise fail for two reasons. First, CIPS argues, Section 5 by its express terms protects a supplier's entitlement "to furnish service . . . to customers at locations" but nowhere purports to create the "territorial obligations" suggested by Menard. Second, CIPS asserts, this Commission has previously considered and rejected the same contention in another case. Illinois Power Company v. Monroe County Electric Cooperative, Docket No. 89-0123 (August 7, 1991). (CIPS Reply Brief at 6)

The Commission also notes that portions of Menard's pleadings and testimony that address these issues are the subject of motions to strike filed by CIPS.

While these pleadings and testimony will not be stricken, the Commission does agree with CIPS that Menard's arguments appear similar to those that have been addressed, and rejected, in prior dockets, such as in the Order in 89-0123. Based on a review of the record in the instant case and a review of the decisions cited, the Commission finds that Menard's arguments on this issue are not persuasive and that such arguments have no bearing on the ultimate determinations made in this Order.

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VI. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having reviewed the entire record herein, is of the opinion and finds that:

(1) CIPS is a public utility within the meaning of the Public Utilities Act and an electric supplier within the meaning of the ESA; Menard is a not-for-profit corporation and an electric cooperative, and is an electric supplier within the meaning of the ESA;

(2) the Commission has jurisdiction of the parties and subject matter hereof;

(3) the facts recited and conclusions reached in the prefatory portion of this Order above are supported by the record and are hereby adopted as findings in this proceeding;

(4) Menard is entitled, as against CIPS, to serve the Donald Thompson residence in question pursuant to Section 5 of the ESA.

IT IS THEREFORE ORDERED that Menard is entitled, as against CIPS, to serve the Donald Thompson residence in question pursuant to Section 5 of the ESA.

IT IS FURTHER ORDERED that CIPS shall cease providing electric service to the Donald Thompson residence in question at such time as Menard has arranged for electric service to be provided thereto, and that the exchange of service from CIPS to Menard shall be accomplished in a manner that results in continuous service to the affected customer.

IT IS FURTHER ORDERED that subject to the provisions of 83 Ill. Adm. Code 220.880, this Order is final; it is subject to the Administrative Review Law.

By order of the Commission this 19th day of July, 2000.

(SIGNED) RICHARD L. MATHIAS

Chairman

(S E A L)